

Supreme Court No. SC85627

IN THE SUPREME COURT OF MISSOURI

JEFFREY L. LAGUD,

Respondent,

v.

KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS, *et al.*

Appellants.

Appeal from the Missouri Court of Appeals Western District

**SUBSTITUTE APPELLATE BRIEF
OF RESPONDENT JEFFREY L. LAGUD**

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JURISDICTION

This matter originated in an administrative hearing before the Kansas City, Missouri Board of Police Commissioners, convened to review the termination of Officer Jeffrey L. Lagud by the Kansas City, Missouri Police Department. Following the hearing, the Board reversed that termination and suspended Officer Jeffrey L. Lagud for allegedly touching the penis of an arrestee during the collection of a urine sample for a drug screen, claiming that this alleged conduct violated departmental policy. The Board also found that Officer Lagud was untruthful in denying the allegations. The matter was appealed pursuant to R.S.Mo. § 536.140 (2000). Jackson County Circuit Court Judge John R. O'Malley reversed the Board's suspension of Officer Lagud and awarded him back pay, costs, and attorney's fees. Judge O'Malley's decision was appealed to the Court of Appeals, which reversed the Circuit Court opinion. The Court of Appeals denied Officer Lagud's Subsequent Motion for Transfer. An Application for Transfer was filed with this Court and was granted on November 25, 2003.

STATEMENT OF FACTS

On September 10, 2000, James K. Russell (hereinafter “Mr. Russell”) was arrested for driving under the influence by Officer James Carmody and Officer Jason Krump. (L.F. at 283-284).¹ Officers Carmody and Krump first encountered Mr. Russell when they noticed his vehicle in a nightclub parking lot with the engine running and the driver’s side door open. (L.F. at 284; 298). The officers then observed Mr. Russell passed out behind the steering wheel, with his upper body dangling from the vehicle. (L.F. at 81; 298; 368). The officers believed Mr. Russell was under the influence of alcohol or drugs, and asked him to exit the vehicle for the purpose of conducting field sobriety tests. (L.F. at 298). Mr. Russell was unable to stand unassisted and fell onto the pavement when exiting the vehicle. (L.F. at 81). Due to his impaired state, Mr. Russell was unable to complete the field sobriety tests. (L.F. at 81). Because Mr. Russell’s keys were in the ignition of his car and the vehicle was running, the officers placed Mr. Russell under arrest for driving under the influence. (L.F. at 284; 298).

During a subsequent search of Mr. Russell’s person and vehicle, the arresting officers uncovered various drugs on Mr. Russell’s person and also uncovered a supply of drugs in a bag located in Mr. Russell’s back seat. (L.F. at 374-376). On September 10, 2000, Mr. Russell

¹ All citations to the Legal File are noted by “L.F. at” followed by the relevant page number(s).

admitted to police that he had ingested Gamma Hydroxy Butyrate (GHB), though he later denied that same fact during the hearing. (L.F. at 303; 352). Mr. Russell was transported to the Department Center Zone Patrol Station. (L.F. at 304).

Officer Jeffrey L. Lagud (hereinafter “Officer Lagud”), a Drug Recognition and Evaluation (DRE) Officer, was called to the holding area to conduct a drug evaluation at the request of arresting officer Carmody. (L.F. at 284-285). After informing Mr. Russell of the Missouri Implied Consent Law, Officer Lagud conducted a breathalyzer test by which he concluded that Mr. Russell was not under the influence of alcohol. (L.F. at 286). Officer Lagud and fellow DRE Officer Bewick conducted the DRE evaluations. (L.F. at 472-474). During these evaluations, Officer Lagud determined that he should collect a urine sample from Mr. Russell. (L.F. at 209; 451-452). Mr. Russell verbally consented to provide the urine sample. (L.F. at 451-452; 474). After Mr. Russell consented, Officer Lagud and Officer Carmody assisted Mr. Russell to the urinal in the holding cell. (L.F. at 474; 312-313). Officer Carmody stood behind Mr. Russell with one hand on his shoulder, to prevent Mr. Russell from falling. (L.F. at 475). Officer Lagud then unzipped Mr. Russell’s pants, and grasped Mr. Russell’s pants and underwear at the hip, and pulled them down. (L.F. at 475). Officer Lagud then directed Mr. Russell to begin urinating, as Officer Lagud held the cup in front of Mr. Russell’s penis. (L.F. at 475). Once Mr. Russell finished, Officer Lagud again grasped the waistband of Mr. Russell’s pants and underwear and pulled them back up. (L.F. at 475).

Later, while lifting weights with his supervisor, Sgt. Carl J. Abraham, Officer Carmody

informally discussed the events surrounding Mr. Russell's drug screen. (L.F. at 328-329; 383-384). During this conversation, Officer Carmody alleged that Officer Lagud had held Mr. Russell's penis while collecting the urine sample. (L.F. at 245; 328-329). An Internal Affairs investigation followed. During this investigation, the investigator informed Mr. Russell that a Department member had alleged that a police officer had touched his penis. (L.F. at 355-356). Prior to receiving this information from the investigator, Mr. Russell had never complained of his treatment. (L.F. at 356). The Kansas City Police Department later terminated Officer Lagud on the basis of this allegation, which the Department claimed was in violation of departmental policy, along with an allegation that Officer Lagud was untruthful about the incident. (L.F. at 433-434). In fact, there was not then, nor is there now, any policy directing officers concerning the appropriate method of collecting a urine sample from an intoxicated subject. (L.F. at 420; Appendix at A8-A9).² A hearing before the Kansas City, Missouri Board of Police Commissioners (hereinafter "the Board") was conducted on April 16, 2001, pursuant to R.S.Mo. § 84.610 in order to review Officer Lagud's termination. (Appendix at A2).

During that hearing, Mr. Russell testified about the events of September 10, 2000.

² All citations to the Appendix are noted by "Appendix at" followed by the relevant page number(s).

(L.F. at 335-362). On direct examination, Mr. Russell presented his version of the events of the evening, before being subject to cross-examination by Officer Lagud's counsel. (L.F. at 335-340). During cross-examination, Officer Lagud's counsel sought to elicit specific and damaging testimony about Mr. Russell's intoxicated state on the night in question. (L.F. at 342-346). When Officer Lagud's counsel specifically asked Mr. Russell whether he had taken the drug GHB, opposing counsel objected to the question and suggested the invocation of Mr. Russell's Fifth Amendment rights. (L.F. at 343). At opposing counsel's suggestion, the Board advised Mr. Russell of his Fifth Amendment privilege. (L.F. at 343-344). Over the objection of Officer Lagud's counsel, the Board determined that all questioning concerning Mr. Russell's drug possession or use would cease. (L.F. at 344-346). Officer Lagud's counsel then requested that the Board strike the entirety of Mr. Russell's testimony from the record. (L.F. at 345-346). The Board denied this reasonable request, choosing instead to credit Mr. Russell's testimony as providing competent evidence. (L.F. at 346; Appendix at A4 - Finding of Fact #7). As a result of the invocation of Mr. Russell's Fifth Amendment privilege, Officer Lagud's counsel was prevented from cross-examining Mr. Russell about his possible history of drug use, his drug use on the night in question, and most importantly, his ability to accurately recall the events of September 10, 2000. Further, Mr. Russell was allowed to present, untested, his version of the events in this matter.

During the hearing, inconsistencies in the testimony of both Mr. Russell and Officer Carmody were readily apparent. During his testimony, Mr. Russell was unable to remember substantial details of the evening, yet he claimed that he could accurately recall Officer Lagud

touching his penis while collecting the urine sample. (L.F. at 339-340). Mr. Russell testified that he initially exited the vehicle unassisted and that he did not fall. (L.F. at 340-341). This fact was contradicted by the DUI Report. (L.F. at 81). Mr. Russell could not recall the police station to which he was taken, nor what he was wearing on September 10, 2000. (L.F. at 336; 356-357). Mr. Russell could not recall who assisted him when he exited the police wagon. (L.F. at 346-348). Mr. Russell could not even recall taking the sobriety tests. (L.F. at 349-352; 443-444). Mr. Russell denied consenting to the urinalysis, though this denial was contradicted by other testimony. (L.F. at 336-337; 451-452; 474). Further, Mr. Russell could not identify Officer Lagud, mis-identifying instead Officer Lagud's co-counsel as the perpetrator of the alleged offense. (L.F. at 337-340). Despite his inability to recall substantial portions of the evening, Mr. Russell testified that he remembered Officer Lagud touching his penis while collecting the urine sample. (L.F. at 339-340). Since Mr. Russell later "took the Fifth" he did not face questioning about his drug use that night, the degree of his intoxication or his ability to accurately recall all other events of that evening.

Officer Carmody was present at the collection of the urine sample on September 10, 2000, as he assisted Officer Lagud in stabilizing Mr. Russell on his feet. (L.F. at 475). During an Internal Affairs investigation interview, Officer Carmody stated that he actually saw Officer Lagud unbutton and unzip Mr. Russell's pants, reach into the waistband and remove Mr. Russell's penis. (L.F. at 313-316). During the hearing, however, Officer Carmody testified that his statement during the Internal Affairs investigation was merely an assumption and that he never actually saw Officer Lagud take this action. (L.F. at 313-316). Officer Carmody

testified that he saw Officer Lagud shake Mr. Russell's penis, but Mr. Russell denied that his ever occurred. (L.F. at 324; 358-359). Officer Carmody testified that he assisted Mr. Russell out of the patrol wagon, but this testimony is contradicted by police video. (L.F. at 307-310). Officer Carmody also testified that Mr. Russell exited his own vehicle on his own, without assistance and without falling. (L.F. at 298-299; 81). This statement is inconsistent with the DUI information sheet concerning the incident. (L.F. at 81).

The Board voted to overturn Officer Lagud's termination, replacing it instead with a suspension without pay. (Appendix at A2-A6). In reaching its decision, the Board expressly relied upon the credibility of Mr. Russell and Officer Carmody. (Appendix at A4 - Finding of Fact #7). On appeal to the Circuit Court, Judge O'Malley reversed the Board's determination, stating, "If the fact of the violation is to be proven only by an unconscious intoxicant relying on the protections of the Fifth Amendment an issue as to whether the decision is supported by 'competent and substantial evidence' is raised." (Appendix at A9-A10). Judge O'Malley found that Officer Lagud should be reinstated without suspension or loss of pay and that his record should be cleared. (Appendix at A10-A11). The Court of Appeals reversed the Circuit Court decision. (Appendix at A13-A32).

POINTS RELIED UPON

1. The Kansas City, Missouri Board of Police Commissioners erred in allowing the invocation of the witness's Fifth Amendment rights in this matter, because the allowance caused Respondent to be denied due process, in that he was not properly afforded the opportunity to confront and cross-examine witnesses against him and the witness's testimony should have been excluded entirely, once the witness invoked his Fifth Amendment privilege and foreclosed the opportunity for effective cross-examination.

Mueller v. Ruddy, 617 S.W.2d 466 (Mo. App. E.D. 1981)13

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)13

State of Missouri v. Blair, 638 S.W.2d 739 (Mo. 1982)15

State of Missouri v. Schnelle, 7 S.W.3d 447 (Mo. App. W.D. 1999)16

2. The Missouri Court of Appeals erred in its application of existing law, which requires deference to the credibility determinations rendered by the Board, because it unreasonably allowed acceptance of determinations which were incongruous and contrary to the weight of the evidence.

Hanebrink v. Parker, 506 S.W.2d 455 (Mo. App. 1974)20

Gamble v. Hoffman, 732 S.W.2d 890 (Mo. banc 1987)20

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ARGUMENT

- A. The Kansas City, Missouri Board of Police Commissioners erred in allowing the invocation of the witness's Fifth Amendment rights in this matter, because the allowance

caused Respondent to be denied due process, in that he was not properly afforded the opportunity to confront and cross-examine witnesses against him and the witness's testimony should have been excluded entirely, once the witness invoked his Fifth Amendment privilege and foreclosed the opportunity for effective cross-examination.

In an administrative proceeding, due process “requires that a litigant have knowledge of the claims of his or her opponent, have a full opportunity to be heard, and to defend, enforce and protect his or her rights.” Graves v. City of Joplin, The Bldg. Bd. of Appeals, 48 S.W.3d 121, 124 (Mo. App. S.D. 2001)(citing Brawley & Flowers, Inc. v. Gunter, 934 S.W.2d 557, 560 (Mo. App. S.D. 1996)). In a civil setting, a party has an established right to confront and cross-examine witnesses against him. Greene v. McElroy, 360 U.S. 474 (1959); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The United States Court of Appeals for the Eighth Circuit has held that due process requires that a public employee be afforded the opportunity to cross-examine witnesses who have presented evidence supporting his termination. Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981). This holding was cited by the United States District Court for the Western District of Missouri in Terry v. Murphy, 1990 U.S. Dist. LEXIS 7264.

In Mueller v. Ruddy, the Court of Appeals reviewed a Circuit Court decision which upheld an Order of the Missouri Real Estate Commission, revoking appellants’ real estate licenses. 617 S.W.2d 466 (Mo. App. E.D. 1981). While analyzing appellants’ claim of violation of due process, the Court stated:

“Of course, appellants are entitled to procedural due process. This requires a meaningful opportunity for appellants to be heard, which includes the right to an impartial decision maker, the right of appellants to know the claims against them and the right to confront and cross-examine

opposing witnesses and to rebut their testimony with appellants' own evidence."

Id. at 475 (citing Tonkin v. Jackson County Merit System Commission, 599 S.W.2d 25, 32-33 (Mo. App. 1980)); Terry v. Murphy, 1990 U.S. Dist. LEXIS 7264. This case clearly establishes Officer Lagud's right to confront witnesses against him in an administrative hearing.

The right of confrontation and cross-examination, as a procedural due process requirement is especially important when the matter involves the potential deprivation of an individual's livelihood. Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963). Further, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Stanley v. Big Eight Conference, 463 F. Supp. 920 (Mo. 1978)(quoting Goldberg v. Kelly, 397 U.S. 254, 269 (1970)).

The Kansas City Police Department terminated Officer Lagud's employment on the basis of an allegation which was raised informally by Officer Carmody and pursued by the Department. By statute, Officer Lagud was afforded an opportunity to appeal his termination to the Board. At the hearing before the Board, the ability of Mr. Russell, as the alleged victim and accuser, to accurately or effectively recall the events of that evening was of crucial importance. Yet, the Board denied Officer Lagud the right to fully confront and cross-examine Mr. Russell, thus denying Officer Lagud his due process rights.

During his direct testimony before the Board, Mr. Russell set forth his version of the events on the night in question. During that testimony, Mr. Russell asserted that Officer Lagud touched his penis while collecting a urine sample for a drug screen. During cross-examination, Mr. Russell conveniently invoked his Fifth Amendment privilege when asked about his drug use on September 10, 2000. After considering

the invocation, the Board refused to allow inquiry of Mr. Russell on matters relating to drug use or intoxication. Had Officer Lagud's counsel been afforded the full opportunity to question Mr. Russell, his answers could have rendered his testimony on direct completely beyond belief, and his inability to recall events of that evening could have been revealed. By failing to allow Officer Lagud's counsel the opportunity to cross-examine Mr. Russell, and by accepting Mr. Russell's testimony as credible evidence, the Board improperly permitted Mr. Russell's untested testimony to stand in corroboration of Officer Carmody's inconsistent version of events.

In addition, when the Board allowed Mr. Russell's Fifth Amendment invocation, Officer Lagud's counsel moved to strike the entirety of Mr. Russell's testimony. The Board denied the motion. Officer Lagud asserts that, as he was not allowed to sufficiently question Mr. Russell on cross-examination, the consideration of any portion of Mr. Russell's testimony is inappropriate. This Court has recognized that, "Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out." State of Missouri v. Blair, 638 S.W.2d 739, 754 (Mo. 1982); State of Missouri v. Brown, 549 S.W.2d 336, 341 (Mo. banc 1977). Allowing the consideration of Mr. Russell's testimony on direct, while disallowing Officer Lagud the opportunity to cross-examine Mr. Russell concerning his degree of intoxication and other pertinent matters permits Mr. Russell's testimony to stand untested, and denies Officer Lagud his procedural due process rights of confrontation and cross-examination. Precluding such inquiry into the details of Mr. Russell's direct testimony presents a danger of prejudice and the testimony should have been stricken. Brown, 549 S.W.2d at 342.

In Blair, 638 S.W.2d at 754, this Court recognized that the right of confrontation includes the right

to cross-examine adverse witnesses. This due process right of confrontation and cross-examination has been recognized in cases of both a civil and criminal nature. As such, case law examining this right in a criminal setting is applicable to this case. The Court in Blair analyzed the potential conflict which exists when a witness exercises his Fifth Amendment privilege, thereby affecting the defendant's ability to fully cross-examine that witness. In its analysis, the Court stated, "courts must be acutely aware of a defendant's right to confront and cross-examine prosecution witnesses and to not permit that right to be diminished by recalcitrant witnesses who give damaging testimony on direct and then refuse to answer questions on cross which are closely related to the commission of the crime because those rights are constitutionally protected." Id.(quoting Brown, 549 S.W.2d at 342-43). Officer Lagud's counsel was prejudicially hampered in his ability to determine the veracity and reliability of Mr. Russell's testimony due to the invocation of the witness's Fifth Amendment privilege. As such, the Board should have granted counsel's motion to strike Mr. Russell's testimony on direct.

Courts have set forth the appropriate remedy for situations where a witness refuses to respond on cross-examination. Such situations can be analyzed in three (3) categories: The first includes a situation in which the answer is so closely related to the commission of the crime that the entire testimony must be stricken. The second occurs when the testimony relates to subject matter which is connected only to a phase of the case. This situation allows a partial striking of testimony. Finally, where the testimony involves only collateral matters, a direction to strike is not required. State of Missouri v. Schnelle, 7 S.W.3d 447, 453 (Mo. App. W.D. 1999); Brown, 549 S.W.2d at 343. A matter is considered collateral when it is not reasonably related to or directly affecting a witness's testimony. Schnelle, 7 S.W.3d at 455.

The events of the evening of September 10, 2000, including the allegations that Officer Lagud

touched Mr. Russell's penis while collecting the urine sample, were the primary focus of testimony before the Board. Mr. Russell's testimony concerning his ability to accurately recall the events of September 10, 2000, is obviously closely related to the allegations raised by Mr. Russell and relied upon by the Kansas City Police Department in terminating Officer Lagud's employment. This testimony was crucial to Officer Lagud's case. Mr. Russell's state of intoxication on that night directly bears upon Mr. Russell's ability to recall pertinent events. As such, under the analysis set forth above, the Board should have stricken Mr. Russell's testimony once Mr. Russell invoked his Fifth Amendment privilege and foreclosed cross-examination on matters closely related to the allegations.

The Board's actions in prompting Mr. Russell to invoke his Fifth Amendment privilege, thereby foreclosing Officer Lagud's opportunity to call into question and undermine Mr. Russell's testimony were brazenly inappropriate. Further, if the Board chose to refuse Officer Lagud's counsel the opportunity to appropriately question the principal witness against him, the Board should have disregarded the entirety of that witness's testimony. Brown, 549 S.W.2d at 343. It was improper for the Board to allow Mr. Russell's self-serving testimony on direct to remain virtually untried, given the obvious indications that Mr. Russell was under the influence on the night in question. In fact, rather than allowing Mr. Russell's recollection to be thoroughly questioned, the Board specifically credited Mr. Russell as providing credible testimony. (Appendix at A4 - Finding of Fact #7). The Court of Appeals recognized this fact when it stated, "The Board's finding that Lagud was untruthful is substantially supported by the testimony of two (2) eyewitnesses to the urine sample incident." (Appendix at A32). The Court of Appeals referred to Officer Carmody and Mr. Russell as the "eyewitnesses" to the incident. In doing this, the Court of Appeals

demonstrated that it relied upon the testimony of Mr. Russell in providing “substantial support” for the Board’s determination. This reliance was inappropriate. This statement also reveals that the Court of Appeals recognized that Officer Carmody’s testimony alone was insufficient. Without consideration of Mr. Russell’s testimony, the Board had only one (1) “eyewitness,” Officer Carmody, whose testimony was inherently unreliable. As such, had Mr. Russell’s testimony been properly stricken, the Board could not have concluded that Officer Lagud violated policy or that Officer Lagud was untruthful. B. **The Missouri Court of Appeals erred in its application of existing law, which requires deference to the credibility determinations rendered by the Board, because it unreasonably allowed acceptance of determinations which were incongruous and contrary to the weight of the evidence.**

Following the Board’s decision, this matter was appealed to the Circuit Court of Jackson County. The Circuit Court found that the Board’s conclusions were not supported by competent and substantial evidence, reversed the suspension imposed by the Board, and awarded Officer Lagud back pay, costs and attorney’s fees. On appeal, the Court of Appeals reversed the Circuit Court’s decision and reinstated the erroneous findings of the Board. In making its determination, the Court of Appeals misapplied existing law, which requires deference to credibility findings rendered by the Board. Such a mandate is inherently flawed, as it unreasonably requires blind acceptance of credibility determinations of the Board, which are contrary to the weight of the evidence. Officer Lagud asserts that the deference to administrative determinations is not tantamount to blind acceptance. Where, as here, the Board’s determinations are patently unreasonable, blind acceptance is both irrational and unjust.

In reviewing the decision of an administrative agency, the court is compelled to view the evidence

in its entirety with all legitimate inferences in a light most favorable to the agency. Jones v. Jennings, 23 S.W.3d 801, 803 (Mo. App. E.D. 2000); Curtis v. Board of Police Commissioners of Kansas City, Missouri, 841 S.W.2d 259, 261 (Mo. App. W.D. 1992). Established law also requires the court to defer to the Board's "superior opportunity" to observe and make credibility determinations with regard to the witnesses. State ex. Rel. Cote v. Kelly, 978 S.W.2d 812, 814 (Mo. App. S.D. 1998); Harrington v. Smarr, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992). In reversing the Circuit Court's decision, the Court of Appeals cited established law requiring deference to the Board's determinations. In this matter, however, the credibility determinations rendered by the Board were so blatantly erroneous that blind acceptance of these assessments was inappropriate and exceeded the Court's judicial mandate. Officer Lagud contends that the Supreme Court should state clearly that the deference given to an agency's credibility and factual findings under Missouri law does not require blind acceptance of those findings.

In Curtis, the Court of Appeals stated, "To determine if the Board abused its discretion, a reviewing court must look to see if the agency's decision is 'against the logic of the circumstances' before the agency 'and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.'" 841 S.W.2d at 262-63 (citing Missouri Real Estate Commission v. McCormick, 778 S.W.2d 303, 308 (Mo. App. 1989)). Further, in Harrington, the Court of Appeals stated, "If the agency could have reasonably made its findings and reached its result, the court on appeal may not substitute its own judgment for that of the agency." 844 S.W.2d at 18. In this matter, the Court of Appeal's blind acceptance of the Board's decision was unreasonable, as the Board could not plausibly render its findings based on the evidence presented. As stated by Judge O'Malley, "If the fact of the violation is to be proven only by an unconscious intoxicant relying on the protections of the 5th Amendment an issue as to whether

the decision is supported by ‘competent and substantial evidence’ is raised.” (Appendix at A9-A10). Therefore, the Circuit Court correctly found a lack of evidentiary support for the decision of the Board.

When reviewing the decision of an Administrative Board, a court must assess whether the Board’s decision is “clearly contrary to the overwhelming weight of the evidence.” Hanebrink v. Parker, 506 S.W.2d 455, 457 (Mo. App. 1974); Gamble v. Hoffman, 732 S.W.2d 890, 892 (Mo. banc 1987). The weight of evidence should be measured by its probative value, which is determined by “its effect in inducing belief.” Hanebrink, 506 S.W.2d at 458. The Board’s findings that Officer Lagud touched Mr. Russell’s penis allegedly in violation of an unstated departmental policy,³ and later was untruthful about the incident are not supported by the weight of evidence presented. Although the Court of Appeals stated that the Board relied upon the testimony of two (2) “eyewitnesses,” neither of these witnesses was able to provide credible testimony. The first eyewitness, Mr. Russell, was chemically impaired on the night in question and, as demonstrated previously, the entirety of his testimony should have been struck once he invoked his Fifth Amendment privilege. The testimony of the second eyewitness, Officer Carmody, is so inconsistent that it is completely unreliable and not worthy of credence. In specifically referring to the import of two (2) eyewitnesses, the Court of Appeals implicitly recognized that Officer Carmody’s testimony, standing alone,

³ Judge O’Malley discusses this lack of policy or operating procedure in his Judgment. (Appendix at A8-A9).

was insufficient.

Although Mr. Russell claims to accurately recall the specific incident which was the basis for his allegations, he has practically no memory as to the other events of the evening. Surely, Mr. Russell's inability to recall significant details of the evening, as well as his misidentification of his alleged perpetrator, raise significant questions with regard to Mr. Russell's credibility and ability to remember pertinent events. Further, Mr. Russell did not raise this allegation independently, rather he was informed by a member of the Department that another officer had suggested that Officer Lagud might have touched his penis while collecting the urine sample for the drug screen. It is readily apparent that Mr. Russell's testimony could not reasonably have induced belief in Mr. Russell's "recollection" of the incident. Therefore, even if it had not been stricken, Mr. Russell's testimony was lacking in probative value and should not rightfully have been a basis for the Board's determination.

Similarly, Officer Carmody's testimony was both inconsistent and questionable. Although Officer Carmody initially claimed he witnessed Officer Lagud's actions, he later admitted he had merely made assumptions. As noted previously, portions of Officer Carmody's testimony are contradicted by Mr. Russell, by other officers, by videotape, by the DUI Information Sheet completed at the scene, and even by his own initial statements. Throughout his dubious testimony, Officer Carmody repeatedly proved his statements to be inconsistent, unreliable and completely lacking probative value. In fact, Circuit Judge O'Malley noted, in his opinion, "Testimony of Officer Carmody is so inconsistent as to be of no value to either side."

As the Board's credibility determinations concerning Mr. Russell and Officer Carmody were unreasonable and against the weight of the evidence presented during the hearing, the Circuit Court properly

rejected the factual and credibility findings of the Board. The Court of Appeal's blind acceptance of the Board's determinations in reversing the Circuit Court was inappropriate. The Court of Appeals should have recognized, as Judge O'Malley did, that the Board's decision was not legitimately supported by competent nor substantial evidence.

CONCLUSION

For the reasons set forth herein, Respondent prays that this Court reverse the decision of the Court of Appeals and reinstate the Order of the Circuit Court of Jackson County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the foregoing Substitute Appellate Brief of Respondent Jeffrey L. Lagud and two (2) true and correct copies of the Appendix of Respondent Jeffrey L. Lagud were mailed, overnight delivery, this 13th day of January, 2004, addressed as follows:

Dale H. Close
Attorney at Law
14315 East 97th Terrace
Kansas City, Missouri 34139-1127

Sean P. McCauley

CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(c), certifies that the foregoing Substitute Appellate Brief of Respondent Jeffrey L. Lagud complies with the limitations set forth in Missouri Rule of Civil Procedure 84.06(b), and that:

1. The Brief contains 5423 words, per the word count of the word processing system;
1. The Brief was prepared with Word Perfect 8.

Sean P. McCauley

CERTIFICATE OF VIRUS-FREE DISK

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(g), certifies that the disk containing Substitute Appellate Brief of Respondent Jeffrey L. Lagud, which was mailed to counsel for Appellants and filed with the Clerk of the Court, was scanned for viruses and is virus-free.

Sean P. McCauley